LYCO ENERGY CORP.

IBLA 85-481 Decided May 27, 1986

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, affirming findings of noncompliance and the imposition of assessments for failure to comply with regulations governing seals on oil storage tank valves. NM 19447, NM 27467.

Affirmed in part and vacated in part.

1. Bureau of Land Management -- Oil and Gas Leases: Civil Assessments and Penalties

   The Bureau of Land Management may properly cite an oil and gas lessee for an incident of noncompliance with regulatory requirements upon a showing of a failure to effectively seal a valve, as required by 43 CFR 3162.7-4(b)(1).

2. Oil and Gas Leases: Civil Assessments and Penalties -- Regulations: Generally

   An assessment for failure to effectively seal a valve levied pursuant to 43 CFR 3163.3(j) may be vacated by this Board, in view of the suspension of that regulation and the change in Department policy that such assessments should automatically be levied.

APPEARANCES: Russell D. Smith, Operations Manager, Lyco Energy Corporation.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Lyco Energy Corporation (Lyco) appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated February 27, 1985, affirming three Incident of Noncompliance (INC) notices, dated January 17, 1985, and assessments of $ 250 for each INC. The reasons for issuance outlined in the three INC's were: "Missing seal on stock tank drain valve" on lease NM 19447 and "Missing seal on stock tank sales line valve" and "Missing seal on stock tank drain valve" on lease NM 27467. In each case, the notice gave appellant 2 days from date of receipt in which to abate the INC. Appellant abated the INC's the day after receipt of notice.

Each assessment was levied pursuant to 43 CFR 3163.3(j), which provides: "For failure to maintain effective seals required by the regulations in this part and by applicable orders and notices, or for failure to maintain the

integrity of any seal placed upon any property or equipment by the authorized officer, $ 250." The applicable regulation requires, as a minimum standard:

> (1) All appropriate valves on lines entering or leaving oil storage tanks shall be effectively sealed during the production phase and during the sales phase. The piping and connections in a closed system which are tamper proof or tamper resistant are essentially protected from unauthorized or undocumented entry, but the piping and connections in an open system shall be protected.

43 CFR 3162.7-4(b)(1). See Farmers Union Central Exchange, Inc., 87 IBLA 332, 92 I.D. 281 (1985).

Lyco requested a technical and procedural review of the INC notices in accordance with 43 CFR 3165.3. Appellant maintained the missing seals had been broken for workover operations and to provide oil from the tanks for hot oil paraffin treatment of the wells. Lyco further explained that, due to sand plugging, the oil in the stock tanks was removed, reprocessed, and replaced. Appellant stated, "[d]uring these operations the stock tanks were gauged each day to insure against loss of oil" (Letter of Feb. 5, 1985, from Lyco to BLM).

BLM issued its February 27, 1985, decision in response to appellant's request for technical and procedural review. BLM noted there was no dispute that the valves were unsealed. In the February 27, 1985, decision BLM stated:

> We cannot justify unsealed valves during periods when the well site is unattended, no matter how long those periods of time are. When an inspector notices missing seals, it is often impossible for him to know precisely how long the seal has been missing or what the intentions of the operator are in regards to replacing the seal. In such cases, there is no discretion allowed in his decision to issue the INC's.

BLM concluded that issuance of these INC's was justified and the assessments were properly imposed.

In the statement of reasons on appeal, appellant objects to the BLM finding that the well sites were unattended:

> We do not dispute the fact that the valves were unsealed. Neither we nor Gold Star can understand how your inspector could not have noticed operations were being conducted on these leases, as the hot oil company was working on the Exxon Federal well at twelve noon on January 17, 1985. We certainly take exception to the statement, "when an inspector notices missing seals, it is often impossible for him to know precisely how long the seal has been missing or what the intentions of the operator are in regards to replacing the seal." Please understand, that in our case, all your inspector needs to do to inquire about operations on our

> leases or to determine our intentions, is to call or meet with our contract gauger, Bill Painter, or call us collect in Dallas.
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> As a responsible and prudent operator, Lyco has endeavored to comply with applicable federal regulations. Had we received notice of this problem on January 17, 1985, we would have corrected it on January 17, 1985. We hope that our relationship with your office in Hobbs is such that in the future we will be given a reasonable amount of time for either corrections or explanations before a fine is assessed. We do object to instant, on-the-spot fines for other than life threatening violations or for violations with immediate environmental consequences. Unnecessary fines increase the expenses of operating wells on Federal leases and will prematurely hasten the plugging of marginal wells for being uneconomical and undesirable to operate. The revenues from these unnecessary fines can not possibly offset lost royalty income to the United States.
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> We again respectfully request that the referenced Notices of Incidents of Noncompliance (INC) and the accompanying fines be cancelled because we were justified in leaving tank valves unsealed at the time of inspection while operations were being conducted which necessitated access to the tanks.

(Statement of Reasons at 1-2). Appellant enclosed copies of invoices from the Gold Star Service Company, Inc., with the statement of reasons. These invoices were for hot oil treatments from 7:00 a.m. - 2:30 p.m. January 17, 1985, at the Exxon Federal #1 well on lease NM 19447 and the Amoco Federal #1 well on lease NM 27467.

[1] Appellant agrees that the valves were unsealed when the BLM inspector arrived on January 17, 1985. However, appellant argues that the valves were unsealed because operations were in progress that day. Appellant also points out the valves were sealed, as required, on January 25, 1985, the day following receipt of the INC's in appellant's Midland, Texas, office. Appellant states "had we received notice of this problem on January 17, 1985, we would have corrected it on January 17, 1985."

The evidence submitted by appellant supports its contention that it was "justified in leaving the tank valves unsealed . . . while operations were being conducted which necessitated access to the tanks." The Gold Star invoices show hot oil treatment was applied from 7:00 a.m. to 2:30 p.m. on January 17, 1985. Had Lyco submitted evidence that the valves were resealed following the work, we would have, at the very least, found sufficient evidence to cause us to set the BLM decision aside and remand it for further consideration. However, appellant also admits the seals were not replaced until January 25, 1985, some 8 days after removal and treatment.

Valve seals are required to control theft of oil and to ensure accountability for production and sales. Thus, while a seal can be removed by an operator for legitimate purposes, once the operation for which the seal has been removed is completed, the seal should be replaced. To allow the valve

to remain unsealed is a violation of 43 CFR 3162.7-4(b). Appellant's statements to BLM during the technical and procedural review and to this Board clearly demonstrate a violation. 1/ Had appellant followed proper procedure and resealed the valves after completion of the operations, the date of receipt of the INC would have no bearing on the outcome of this appeal. As it is, the operator did not replace the seal until after having been notified of the INC.

43 CFR 3163.1 authorizes BLM offices to assess liquidated damages in specific instances of noncompliance. A finding of the violation and a levy of assessment are two separate determinations, made pursuant to different regulations. Appellant objects to these assessments as unjustified, unnecessary fines. As this Board stated in Mont Rouge, Inc., 90 IBLA 3 (1985):

> An assessment under 43 CFR 3163.3 is not considered to be either a fine or a penalty. Rather, it is in the nature of "liquidated damages" to "cover loss or damage to the lessor from specific instances of noncompliance." 43 CFR 3163.3. [2/] Thus, if a finding of noncompliance is technically and procedurally correct, a minimum assessment is properly levied, regardless of subsequent efforts on the part of lessee to comply by abatement of the noncompliance condition.

The regulations mandate that when an assessment is levied, it is to be in an amount not less than $ 250. 3/ As explained in the preamble to the regulations dated September 21, 1984, 4/ such an assessment is compensation

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1/ This case differs from Anadarko Production Co., 91 IBLA 154 (1986), in which appellant challenged the necessity of the seal for which the INC notice had been issued and argued that the regulation requiring the sealing of all "appropriate" valves was ambiguous. The regulation was found to be ambiguous when applied to the facts set forth in Anadarko, and the Board reversed BLM's determination.

2/ A failure to perform or commence remedial action pursuant to a notice may subject a lessee to a penalty pursuant to 43 CFR 3163.4-1.

3/ The assessment regulation for which appellant was cited, 43 CFR 3163.3(j), was subsequently suspended by notice printed in the Federal Register (50 FR 11517 (Mar. 22, 1985)).

4/ The preamble to this regulatory revision explained:

"Section 3163.3 Assessments for noncompliance:

Two comments suggested that certain of the assessments provided for in this section of the existing regulations are de facto penalties and should either be removed by the final rulemaking or applied under the procedures prescribed by section 109 of the Federal Oil and Gas Royalty Management Act and § 3163.3 of the existing regulations. The final rulemaking does not adopt either of these suggested changes because such assessments do not constitute penalties. While these assessments may appear to be penalties, they are merely compensation to the United States for damages to resources or existing improvements and the added administrative cost to the United States caused by reason of a lessee's failure to comply with the regulations in this part and the resultant need for regulatory action to obtain a correction of the deficiency."

49 FR 37361 (Sept. 21, 1984).

to the United States. Costs and expenses are incurred by BLM which would not have been incurred but for the noncompliance. BLM must issue the notice, and take such steps and conduct such additional physical inspections as are necessary to ensure the noncompliance is abated. Although good faith or timeliness of compliance may be a consideration as to the penalty provisions of 43 CFR 3163.4-1, neither is a consideration under 43 CFR 3163.3(j). Yates Energy Corp., 89 IBLA 150, 153 (1985).

BLM's decision stated its inspector had "no discretion allowed in his decision to issue the INC's." The regulations are not as restrictive regarding the levy of assessments, however. While the terms of 43 CFR 3163.1 are sufficiently broad to provide discretionary authority to not levy an assessment, BLM's stated policy at the time of issuance of the INC's was to automatically levy an assessment pursuant to 43 CFR 3163.3. 5/ See Instruction Memorandum (IM) No. 84-594 (July 12, 1984); IM No. 84-594 Change 3 (Jan. 4, 1985). On March 22, 1985, BLM suspended 43 CFR 3163.3(c) through (j), except where actual loss or damage could be ascertained, stating:

> It is the intent of the Bureau to more clearly define the operational requirements of the Federal Oil and Gas Royalty Management Act. While the necessary in-depth analysis of these regulations is occurring, the Bureau, through the exercise of its delegated discretionary authority, is taking interim actions to: (1) Suspend the use of the assessment for noncompliance provisions of 43 CFR 3163.3(c) through (j), except where actual loss or damage can be ascertained.

50 FR 11517 (Mar. 22, 1985).

BLM implemented this suspension in IM No. 85-384 (Apr. 16, 1985), as follows:

> Enclosed is a copy of the Notice of Intent to propose rulemaking which was published in the Federal Register on March 22, 1985. As stated in this notice, the following actions are hereby taken:
>
> > The assessment for noncompliance provisions under 43 CFR 3163.3(c) through (j) are suspended, except where actual loss or damage can be ascertained.

On January 30, 1986, BLM proposed rules to clarify the operational requirements of the Federal Oil and Gas Royalty Management Act and the

5/ The "automatic levy of assessments" was established by BLM through a policy determination as to how to apply the provisions of 43 CFR 3163.1. That regulation lists the levy of an assessment as one of a number of courses of action which BLM could individually or collectively take. For example, the BLM could recommend cancellation of the lease rather than levy an assessment. The levy of an assessment was, therefore, clearly a discretionary determination.

Mineral Leasing Act contained in 43 CFR Part 3160, 51 FR 3882 (Jan. 30, 1986). The proposed rules would eliminate the automatic assessment for the failure to maintain effective seals under 43 CFR 3163.3(j). In the preamble to the proposed regulations BLM states: "Assessment under the various Acts authorizing the leasing of minerals would be modified by the proposed rulemaking to eliminate automatic assessment for noncompliance involving violations of Z 3163.3(d), (e), (g), (h), and (j) of the existing regulations." (Emphasis added.) 51 FR 3887 (Jan. 30, 1986). Therefore, under the proposed rules, a lessee cited for failure to maintain effective seals would be given a specified time to comply. 43 CFR 3163.3(b)(1). Hence, BLM would not automatically assess Lyco but would be required to give Lyco notice it had violated the valve sealing requirements.

We recognize 43 CFR 3163.3(j) was in effect at the time BLM took its action, and neither the suspension nor the proposed regulations are clearly dispositive herein. They do, however, reflect the Department's present policy concerning the levy of an assessment for failure to maintain effective seals. In the past this Board has applied a stated change in policy to a pending matter, if to do so would benefit the affected party, and there are no countervailing regulations, public policy reasons, or intervening rights. Somont Oil Co., 91 IBLA 137 (1986). For that reason, we vacate the decision to levy an assessment pursuant to 43 CFR 3163.3(j). 6/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the New Mexico State Office is affirmed in part and vacated in part.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge.

6/ Regulatory authority to waive assessments is found at 43 CFR 3163.5(c).